International Union of Operating Engineers, Local 68, AFL–CIO (Ogden Allied Eastern States Maintenance Corp.) *and* Allen Saitta. Case 22–CB–5957

July 31, 1998

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

The principal issue presented here is whether the judge correctly found that discriminatee Allen Saitta did not incur a willful loss of earnings by rejecting certain offers of interim employment during the backpay period.[1] The Board has considered the supplemental decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings, and conclusions, as further explained below, and to adopt his recommended Order.

In the underlying unfair labor practice proceeding, reported at 306 NLRB 545 (1992), the Board affirmed an administrative law judge's finding that the Respondent, Operating Engineers Local 68, unlawfully caused the discharge of Allen Saitta from his job with Ogden Allied Maintenance Corporation on September 14, 1988. The Board found that the business manager of the Local, acting in reaction to disparaging comments made by Saitta about a steward who was handling his contractual grievance, took away Saitta's union book and told him he was out of a job. Immediately thereafter, the Local contacted Ogden and informed it that Saitta would not be working there, thereby effectively terminating Saitta's employment. The Board found that Ogden, named in the complaint as a co-respondent, had no knowledge of or liability for the Union's unlawful conduct.

In this compliance proceeding to determine the amount of backpay the Respondent owes Saitta, the Respondent makes several arguments in support of its general defense that Saitta incurred a willful loss of interim earnings. The judge rejected these arguments. In particular, he found that Saitta justifiably rejected three offers of employment made by Ogden. We agree, but we will comment briefly on the first two offers.

The first offer, made on February 21, 1989, would have reinstated Saitta to the mechanic's helper job that he held prior to his discharge. We agree with the judge that this offer did not involve substantially equivalent employment because the credited testimony shows that Saitta's seniority would have earned him a promotion by this date to a higher paying position had he not been unlawfully discharged. Only a month earlier, Saitta had left another interim job, and he was otherwise engaged in what the judge found to be a reasonable overall search for interim employment. Under these circumstances, we find that Saitta had no obligation at this point to mitigate the Respondent's liability by lowering his sights and accepting a job that was not substantially equivalent to the job he would have held if the Respondent had not discriminated against him.

On February 28, 1989, Ogden made another job offer to Saitta. This time, the job would have entailed wages and benefits that were essentially the same or arguably better than those that Saitta would have enjoyed had he remained in Ogden's employ and been promoted. The job was not, however, at Saitta's former workplace in Navesink, New Jersey, or in his former bargaining unit. It was instead in a separate bargaining unit also represented by the Respondent Union in Basking Ridge, New Jersey. Saitta would have no job seniority in that unit.

Unlike the situation of Ogden's previous offer, the lack of seniority in the Basking Ridge job offer does not preclude finding that it was substantially equivalent to the job Saitta would have held at Navesink if he had remained working and been promoted there. The lack of seniority is nevertheless a critical factor in assessing the reasonableness of Saitta's rejection of the Basking Ridge job. There is no evidence that the Respondent, which had 5 months earlier discriminatorily ousted Saitta from a job with Ogden, either supported or acquiesced in Ogden's offer of reemployment to another Ogden jobsite subject to the Respondent's control. The judge credited Saitta's testimony that he believed he needed seniority to protect him from further retribution by the Respondent. Under the circumstances, we find this a reasonable apprehension. Again emphasizing the judge's finding that Saitta was at the time engaged in an overall good-faith search for interim employment, we find that he was under no obligation to test whether the Respondent had experienced a change of heart about Ogden's employment of him.[3]

[1] On May 13, 1996, Administrative Law Judge James F. Morton issued the attached supplemental decision on backpay. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief. The Respondent and the General Counsel each filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has requested oral argument. The Respondent's request is denied as the record and briefs adequately present the issues and positions of the parties.

[3] We find no inconsistency between our analysis of Saitta's rejection of the offers at issue here and *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), on which the Respondent relies in exceptions. In *Ford Motor*, the Court held that an employer charged with discrimination against a job applicant can toll the accrual of backpay by offering the job previously denied to the applicant and is not required to offer seniority retroactive to the date of the alleged discrimination. Even assuming that this holding in a case arising under Title VII of the Civil Rights Act of 1964 should apply to backpay issues arising under our Act, it would not control here. The Court clearly did not hold that a discriminatee *with accrued job seniority* would be obliged to accept interim employment in the same job but without any seniority. Furthermore, the Court did not have before it a factual situation where the discriminatee's seniority would have earned him a promotion—a key factor in our analysis of whether Ogden's February 21 job offer entailed substantially equivalent work—or where the discriminatee reasonably believed that seniority was necessary to protect him from further discrimination by the wrongdoer who played no role in making the interim job offer but had control

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local 68, International Union of Operating Engineers, AFL–CIO, West Caldwell, New Jersey, its officers, agents, and representatives, shall make whole Allen Saitta in the manner set forth there.

Marguerite R. Greenfield, Esq., for the General Counsel.
Mary E. Moriarty, Esq., for the Respondent Union.
Mandy R. Steele, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

JAMES F. MORTON, Administrative Law Judge. The General Counsel seeks backpay for Allen Saitta from September 14, 1988, to October 1, 1994, of approximately $162,000 plus interest. International Union of Operating Engineers, Local 68, AFL–CIO (the Respondent) had been found by the Board, in the underlying case reported at 306 NLRB 545 (1992), to have unlawfully caused Saitta's loss of employment with Odgen Allied Eastern States Maintenance Corporation (Odgen) on September 14, 1988. An additional sum of approximately $71,500 is sought for pension and annuity contributions on his behalf during that same time period. Further, the General Counsel contends that Saitta's backpay period did not end on October 1, 1994, but continues to run, assertedly because he has not been reinstated to his former position with Odgen and has not obtained substantially equivalent employment.

The Respondent contends that Saitta's backpay period was tolled on February 21, 1989, by reason of his having refused an offer of employment then that it alleges was substantially equivalent to the job he held with Odgen on September 14, 1988. On that basis, it would limit Saitta's gross backpay to approximately $17,000 plus interest. Alternatively, the Respondent contends that Saitta's backpay period was terminated at later times based on its assertions that he refused other offers of substantially equivalent employment. The Respondent separately contends that any amount claimed for Saitta should be reduced as he had, in its view, engaged in a willful course of action throughout the backpay period in refusing to make any meaningful effort to secure employment equivalent to the job he held with Odgen. In that regard, Local 68 asserts that Saitta did not make a diligent search for interim work, that he rejected offers of employment, that he quit jobs without justification, that he unjustifiably caused employers to discharge him and that, at times, he was otherwise unavailable for employment.

I heard this backpay case in Newark, New Jersey, on November 6 and 7, 1995, and on March 4, 1996. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

A. Background

In the underlying case, complaints had issued against Local 68 and against Odgen; they were consolidated for hearing. Local 68 was alleged to have unlawfully caused Odgen to have discharged Saitta from its employ on September 14, 1988. Odgen was alleged to have unlawfully discharged Saitta by having acceded to Local 68's request. The evidence, at the hearing in that case before Administrative Law Judge Edelman, disclosed that Local 68, in retaliation against Saitta for his intraunion activities, took away his union book and told him that his job with Odgen was over. Local 68's business manager then called Odgen and left a message that Saitta would no longer be working for it. Saitta ceased reporting for work at Odgen. The Board adopted Judge Edelman's finding that the evidence failed to establish that Odgen discharged Saitta based on an unlawful request by Local 68. It also adopted his finding, as to the allegation against Local 68, that it had unlawfully effected Saitta's termination of employment. The Board, in its Supplemental Decision and Order issued on February 28, 1992 (306 NLRB 545), thus dismissed the complaint against Odgen but ordered Local 68 to make Saitta whole, with interest, for any loss of pay he may have suffered as a result of the discrimination as stated in the specification.

B. The Gross Backpay Formula

In 1988, Odgen provided building maintenance services for various business enterprises, including Bell Communications Research, Inc. at Bell's facility in Navesink, New Jersey. Saitta was working for Odgen at this facility when his employment was terminated on September 14, 1988. He had begun working there for Odgen on November 11, 1985. As of the date of the start of the backpay period, he was employed as a mechanic's helper, earning $12.97 per hour with seniority, pension, and annuity benefits. The gross backpay formula set forth in the specification is based essentially on his earnings and benefits then and, later, on the wages and benefits of the individual who replaced him on Odgen's seniority roster at Navesink after his termination and who, as a consequence, had been promoted to a higher paying job. The formula is not in dispute. The backpay period is, as are other matters, noted above.

C. Offers of Employment

1. The contentions

The Respondent contends that Saitta refused three offers of substantially equivalent employment and that his backpay period terminated at the time of any one of those refusals.

2. The offers

The first offer, relied on by the Respondent, was made by Odgen in mid-February 21, 1989, just prior to the issuance of the complaint in the underlying case. Odgen offered Saitta employment at his former place of employment, Navesink, in his former job classification, mechanic's helper, but without restoration to his position on the seniority list. The offered rate of pay, job duties, and benefits appear to have been identical to those he had there before he left on September 14, 1988. Saitta refused this offer as it did not provide for restoration of his seniority status.. He testified credibly that the offer was unfair as, with his seniority, he would have been promoted and as his seniority would also offer him "protection from the wrath of the [Respondent]."

The second offer referred to in the Respondent's answer was made by Odgen to Saitta on February 28, 1989, several days after its first offer, discussed above. Odgen had written Saitta, offering him a job as a mechanic's helper at an A.T. & T. facil-

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over continuing employment in that job—the situation entailed by Ogden's February 28 job offer.

ity in Basking Ridge, New Jersey. It informed Saitta in that letter that, if it was found that Odgen discharged him in violation of the Act as alleged in the complaint then outstanding against it, Odgen would reinstate him at Navesink with full seniority. The job at Basking Ridge had a higher wage rate than the rate he had been paid at Navesink. The employees of Odgen at Basking Ridge were also represented by the Respondent but were covered under a collective-bargaining agreement separate from the agreement covering the Odgen employees at Navesink. The agreement for the Basking Ridge unit provided for substantially the same benefits provided for Odgen's employees at Navesink; the Basking Ridge contract provided for a seniority roster limited to the employees there. On March 10, 1989, Saitta refused the offer to work at Basking Ridge for the same reasons he rejected the mid-February offer discussed above.

Odgen made another offer to Saitta but that one is not relied on by the Respondent as it was withdrawn. Rather, the General Counsel asserts that the circumstances pertaining to Odgen's withdrawing its offer justify Saitta's insistence upon restoration of his seniority. On May 3,1989, during the course of the hearing in the underlying case before Judge Edelman and as later noted in his decision, Odgen had offered to reinstate Saitta in full at Navesink. Saitta accepted. However, the Respondent's shop steward, Dave Stanley (who had been accused by Saitta, in complaints made to the Respondent's officers, of "sleeping with management") conducted a poll among the employees at Navesink which indicated that they would walk out if Saitta was reinstated. Odgen's customer there, Bell Communications, then told Odgen that, in order to keep labor peace, it had better not reemploy Saitta there. As a result, Odgen withdrew that offer.

The third job offer relied on by the Respondent was made in a letter to Saitta by counsel for the Respondent on July 24, 1989. He wrote that the Respondent had obtained employment for him with National Engineering Maintenance Corporation, a contractor providing maintenance services at a U.S. Life Insurance building and with whom the Respondent has a collective-bargaining agreement covering its employees there. The letter directed Saitta to "report to the job site on Monday, July 31, 1989 at 9:00 a.m. to commence work" and to let it know before July 31 if he did not accept that job. Saitta testified credibly as follows respecting the ensuing events. He reported to that site on July 31 wearing his work clothes but was not put to work. Instead, National Engineering's chief engineer, Joe Griffith, asked him to leave his telephone number and told him that he would have to meet with Philip Montalbano, National Engineering's manager of engineering. Saitta was interviewed by Montalbano on August 4,1989, and was told that he would have to come back again to be interviewed by a U.S. Life Insurance official. Montalbano told him that he, Montalbano, had no authority to offer him a job. Montalbano also told him that, if the U.S. Life official asked, Saitta was to tell him that he was still working with the Respondent and that he was not to disclose his problems with the Respondent. Saitta replied that he would not lie. He left. Later that day, he received a telephone call from Chief Engineer Griffith informing him that he was to come in for an interview with U.S. Life. Saitta told Griffith that he would get back to him. The record before me also contains the following matters. A short while after Saitta left the U.S. Life site on August 4, Montalbano sent a mailgram to him advising him that his job as maintenance helper at U. S. Life is to begin on Monday, August 7 and that he is to report to Griffith as 8 a.m. in proper work attire. There was no reference in the mailgram as to Saitta's having to be interviewed by a U. S. Life official. Also on August 4, the Respondent's counsel wrote Saitta a letter which made the following assertions—that Saitta had told Griffith and Montalbano that he was under a legal obligation to inform them that he had problems with the Respondent, that they then advised him that they were not interested in hearing about his problems, that Montalbano told him then that he did not think it was appropriate for him to meet with a U.S. Life representative in view of his attire, and that Saitta thereupon left. Saitta testified that this letter was, in essence, "nasty" in that it accused him of being at fault although it was obvious to him that the writer "didn't even know the circumstances." The record does not reflect how the Respondent's counsel got the information on which he made the assertions in his letter. In any event, Montalbano's testimony at the hearing controverted them in material part. Griffith did not testify.

3. Analysis

In *Sheet Metal Workers Local 35 (Zinsco Electrical),* 254 NLRB 773 (1981), the Board held that, where a union unlawfully caused an employee's termination of employment, it will be required, inter alia, to make the employee whole for all losses of wages and benefits suffered by the employee as a result of its discrimination against the employee until the employee is either reinstated by the employer to his or her former or substantially equivalent position or until the employee obtains substantially equivalent employment elsewhere. The last phrase has been construed to include an offer of substantially equivalent employment that has been unjustifiably rejected. See *Teamsters Local 559 (Mashkin Freight Lines*), 257 NLRB 24, 30 (1981). The Respondent has the burden of proof as to all issues relating to the diminution of gross backpay and any uncertainty is to be resolved against it as its unlawful conduct made certainty impossible. See *Pope Concrete Products,* 312 NLRB 1171 (1993), and *Churchill's Supermarkets,* 301 NLRB 722, 725 (1991).

Odgen's offer of February 21, 1989, was obviously not to a substantially equivalent position as it denied Saitta the promotion to which his seniority entitled him, as is evident from the backpay specification.

Saitta's rejection of Odgen's offer on February 28, 1989, and his unwillingness to pursue interviewing with National Engineering in the summer of that year, when viewed from his perspective and in context with the totality of the circumstances, were not unreasonable. He had been forced off his job by the Respondent; it took away his union book; it threatened a strike to compel Odgen to withdraw its offer to reinstate him in full; it has done nothing to dispel its animus towards him for having asserted his rights under the Act; it told him to report for work with National Engineering at 9 a.m. on July 31 and to let it know before then if he did not accept that position, when it knew that Saitta would instead be subjected to a series of interviews as is evident from its counsel's letter of August 4. That very letter was sent the day that Montalbano told Saitta that he would have to return for a further interview and it clearly misstated what Saitta had experienced in his interviews. There is nothing in the record which explains how the Respondent was privy to those interviews. Nor is there anything to explain why National Engineering changed its position as to Saitta having to return for a third interview before he could be offered a job; its

telegram of that same date instructed him to report for work on August 7. The continuing hostility the Respondent has evidenced towards Saitta, the apparently strong influence it exerts with Odgen and National Engineering, and the overall circumstances make it clear that the Respondent has failed to prove that Saitta unjustifiably refused offers of substantially equivalent employment.

D. Saitta's Alleged Willful Failure to Seek and Keep Interim Employment

1. As to Saitta's efforts to secure work and as to the jobs he held

The Respondent asserts that Saitta's employment history since his termination of employment with Odgen on September 14, 1988, reveals a willful failure on his part to seek or keep a job. The evidence respecting this assertion is as follows.

Saitta was unemployed for approximately 2 months after his termination and until he worked for 3 days at Harmon Cove as discussed below. He was unemployed also for approximately 15 months beginning in late 1988 and had other periods of unemployment, as is apparent from the job chronology set out below. He testified that during his periods of employment he sought employment by mailing out job resumes, visiting worksites, registering with an employment agency, replying to newspaper advertisements, obtaining leads from friends, and making phone calls. He collected unemployment benefits from New Jersey and Pennslyvania and, in doing so, had to satisfy their job search requirements. He maintained an extensive record of the companies where he applied for work, including responses which he received after he had mailed copies of his resume and which informed him, in substance, that they had no job for him.

About a month or two after the Respondent had caused Saitta to leave his job with Odgen at Navesink, Odgen offered him a job as a mechanic's helper at its Harmon Cove facility in Secaucus, New Jersey. The Odgen employees there were represented by a local union of the International Brotherhood of Teamsters. He took that job. It paid about $13 per hour but there were no pension or annuity benefits. Saitta worked for just 3 days. A Teamsters local was having problems with Odgen there. Saitta left that job when he overheard a Teamsters business agent shout that he was going "to blow this god damn building up."

Saitta was unemployed from the time he left the Harmon Cove job until he began work with Maxwhale Corp. on January 29, 1990. He worked there for over a year as a HVAC technician. His starting rate of pay was $8 per hour. When he left its employ on February 2, 1991, he was earning about $13 per hour. He received no pension or annuity benefits. He resigned from that position because his apartment rental in Flanders, New Jersey, became excessive when his roommate moved out and as he had incurred other financial obligations. He moved to Pennsylvania to live with his parents.

In March 1991, he began working with John's Mfg. Co. There, he sanded cabinets at a wage rate of $5 per hour with no benefits. He was discharged in May 1991 because the company was not satisfied with the sanding work he had done.

His next job was in June 1991 with Pride Health Care assembling motorized carts at a wage rate of $5 per hour with no fringe benefits. He was discharged after about a month because he lacked the aptitude for that work.

In July 1991, he secured a job with ACS as a HVAC mechanic, earning $6 per hour with no fringe benefits. He left ACS after several months when he moved back to New Jersey to work as a HVAC mechanic with a company named You're Cool Service. He earned $10 per hour but again there were no fringe benefits. He had some disciplinary problems with that employer, chiefly pertaining to his attendance record. He quit that job in September 1991 in protest of the discharge of a friend of his.

On leaving You're Cool Service, he began work as a boiler operator with the South Amboy Hospital at a wage rate of $10 per hour with some benefits. He worked there for almost 3 years and left to accept a job with a construction contractor, Duffy Smith, t/a Air Dynamics. While so employed, Saitta missed a number of workdays due to illness. Smith, who otherwise was satisfied with Saitta's work, discharged him in late December 1993 because of those absences.

In February 1994, he started work with Manteck as a boiler operator at $15 per hour with health insurance coverage but without other benefits. During that period of employment, Saitta had made several complaints about the safety of the boiler and as to the type of clothing he was supposed to wear. He was discharged in August 1994.

Saitta was unemployed from then until March 1995 when he began working as a boiler operator for CSI, a contractor at a BASF plant in Clifton, New Jersey, at $18 per hour but without benefits. He lost that job in August 1995 when he broke his ankle while at work.

2. Analysis

It is well settled that the party that is responsible for unlawfully discriminating against an employee bears the burden of establishing, by a preponderance of the evidence, that the employee failed to mitigate losses resulting from the discriminatory conduct. Any uncertainty must be resolved against the wrongdoer whose conduct made certainty impossible. See *Pope Concrete Products,* 312 NLRB 1171 (1993), and cases cited therein. The sufficiency of a discriminatee's efforts to mitigate backpay will be determined with respect to the backpay period as a whole. See *I.T.O. Corp. of Baltimore*, 265 NLRB 1322 (1982), and cases cited therein. The Respondent relies in good part on copies of newspapers advertisements which it contends described jobs which Saitta could have filled if he were seriously seeking work. Those advertisements, when weighed in context with the totality of the evidence in this case, are insufficient to sustain the Respondent's burden. See *E & L Plastics Corp*., 314 NLRB 1056 (1994).

It is readily evident, and I so find, that the Respondent has not met its burden of showing a willful failure on Saitta's part to mitigate its liability towards him.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, International Union of Operating Engineers, Local 68, AFL–CIO, West Caldwell, New Jersey, its

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

officers, agents, successors, and assigns, shall (1) pay to Allen Saitta net backpay of $161,918.49 for the period set forth in the specification, i.e. from the date of his unlawful termination of employment to October 1, 1994,[2] the interest thereon as provided for in the Board's Order and (2) pay $15,200 on Saitta's behalf to the Local 68 Engineers Pension Fund and $56,001.91 to the Local 68 Engineers Annuity Fund, also on his behalf.

[2] The backpay period continues until Saitta is reinstated in full or obtains substantially equivalent employment as provided for in the Board's Order.